COURT OF APPEALS
DECISION
DATED AND FILED

MARCH 3, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0201-CR

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT I

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

GREGORY A. MILLER,

DEFENDANT-APPELLANT.

APPEAL from judgment of the circuit court for Milwaukee County: DAVID A. HANSHER, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

PER CURIAM. Gregory A. Miller appeals from a judgment of conviction entered after a jury found him guilty of first-degree reckless injury and resisting an officer.[1] Miller argues that: (1) the evidence was insufficient to

[1] On appeal, Miller challenges only the conviction for first-degree reckless injury.

support the jury's verdict on the first-degree reckless injury charge; and (2) the trial court erred in denying his request for a theory of defense instruction. We reject his arguments and affirm.

Miller was charged with attempted first-degree intentional homicide, first-degree reckless injury, and resisting an officer as a result of his drunken attack on City of Franklin Police Officer Kim Shervey. At trial, Officer Shervey testified that at approximately 9:00 p.m. on August 29, 1995, she responded to a report of an intoxicated individual walking in traffic on West Rawson Avenue. On arrival, Officer Shervey saw Miller walking in the roadway. After calling and waiting for backup officers to arrive, Officer Shervey took Miller into protective custody. Miller refused to cooperate, however, and struggled with the officers. During the struggle, Miller pulled Officer Shervey into a choke hold, and pushed her face into the ground. Each of the officers who were called for backup testified that at some point in her struggle with Miller, Officer Shervey appeared to have lost consciousness.

Officer Shervey testified that she suffered a cervical sprain, and that the treatment for her injury consisted of physical therapy three times a week, pain medication, and muscle relaxers for her neck. She also stated that her therapy lasted well over four months, and that she still suffered from tension headaches related to her injury.

At the conclusion of the three-day trial, the jury acquitted Miller of attempted first-degree homicide and convicted him of first-degree reckless injury and resisting an officer. On June 21, 1996, the trial court sentenced Miller to eight years' imprisonment on the first-degree reckless injury charge.

Miller contends that the evidence was insufficient to support the jury's verdict on first-degree reckless injury.[2] Specifically, Miller argues that "the evidence was not sufficient to meet the element of 'great bodily harm' where the only harm caused was a possible temporary loss of consciousness and a cervical sprain." We disagree.

On review, this court may not reverse a conviction on the basis of insufficient evidence "unless the evidence, viewed most favorably to the state and the conviction, is so insufficient in probative value and force that it can be said as a matter of law that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt." ***State v. Poellinger***, 153 Wis.2d 493, 501, 451 N.W.2d 752, 755 (1990). "Great bodily harm" is defined in § 939.22(14), STATS., as an injury "which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury."

Miller argues that Officer Shervey suffered only substantial bodily harm. Miller, however, focuses only on whether Officer Shervey incurred bodily injury (1) which created a substantial risk of death, (2) which caused serious permanent disfigurement, or (3) which caused: a) a permanent or protracted loss, or b) impairment of the function of any bodily member or organ. He fails to

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[2] Section 940.23(1), STATS., provides:

> **(1)** FIRST-DEGREE RECKLESS INJURY. Whoever recklessly causes great bodily harm to another human being under circumstances which show utter disregard for human life is guilty of a Class C felony.

include or address the final element—whether the victim suffered "other serious bodily injury." *See* § 939.22(14), STATS.

The phrase "other serious bodily injury" allows a jury to find "great bodily harm" when "serious" injuries have occurred. In ***La Barge v. State***, 74 Wis.2d 327, 246 N.W.2d 794 (1976), the supreme court ruled that "other serious bodily injury" has a distinct meaning independent of that encompassed by the other definitions of "great bodily harm," and was intended to broaden the scope of § 939.22(14) to include injuries in addition to those specifically identified in the statute. *See* ***id.*** at 334, 246 N.W.2d at 797. The court explained that "[t]he words 'serious bodily injury' are words of ordinary significance, and … they are well understood by any jury of ordinary intelligence." ***Id.*** at 335, 246 N.W.2d at 797-98 (citation, internal quotations and parentheses omitted). In ***Cheatham v. State***, 85 Wis.2d 112, 270 N.W.2d 194 (1978), the supreme court considered and rejected a claim that ***La Barge***'s definition of "other serious bodily injury" rendered § 939.22(14), STATS., unconstitutionally vague. *See* ***id.*** at 125, 270 N.W.2d at 200. The ***Cheatham*** court explained that " '[g]reat bodily harm' still requires 'serious' injury, something greater than mere 'bodily harm.' Although the line between the two is not mathematically precise, it is one a jury is capable of drawing." ***Id.*** at 124, 270 N.W.2d at 200; s*ee also* ***State v. Schambow***, 176 Wis.2d 286, 297, 500 N.W.2d 362, 366 (Ct. App. 1993) ("[I]t is important to emphasize that the question of the existence of great bodily harm is an issue of fact exclusively for the jury to decide.").

Thus, a jury may conclude that a victim has suffered "great bodily harm" as long as the victim has suffered an injury that is "serious," defining the term as it is ordinarily understood, regardless of whether the injury creates a substantial risk of death, permanent disfigurement, or impairment. Given the

nature of Officer Shervey's injuries, we conclude that the evidence was sufficient to support the jury's verdict.

Testimony established that while Officer Shervey was in Miller's choke hold, she was being smothered and was having difficulty breathing. Officer Shervey struggled with Miller but eventually stopped and went limp. She was taken to St. Luke's Hospital, where she was diagnosed as having suffered "a cervical sprain from [Miller] putting [her] in a choke hold." Officer Shervey received medical care for her injury for over four months. Her treatment included physical therapy and medication. As of the date of trial, May 20, 1996, she still suffered from tension headaches related to her injury. A jury could have reasonably concluded that Officer Shervey's injuries were serious. Therefore, the evidence was sufficient to support the jury's verdict that Miller caused great bodily harm to Officer Shervey under circumstances which showed utter disregard for human life. *See* § 940.23(1), STATS.

Next, Miller claims that the trial court erred by failing to submit his requested theory of defense instruction distinguishing "great bodily harm" from "substantial bodily harm" from "bodily harm." He argues:

> If the victim had broken a bone in her neck (without any resulting paralysis) …, the victim would have suffered "significant bodily harm" [sic] because that definition includes "any fracture of a bone." It is illogical that a victim who actually breaks her neck suffers significant bodily harm [sic] while a victim who merely sprains her neck suffers great bodily harm.

Miller contends that the jury needed further guidance given his theory that the evidence might have established substantial bodily harm, but not great bodily harm. Again, we are not persuaded.

A trial court has broad discretion in deciding whether to give a requested instruction. *See* ***State v. Coleman***, 206 Wis.2d 199, 212, 556 N.W.2d 701, 706 (1996). "However, a [trial] court must exercise its discretion in order 'to fully and fairly inform the jury of the rules of law applicable to the case and to assist the jury in making a reasonable analysis of the evidence.'" ***Id.*** at 212, 556 N.W.2d at 706 (quoted source omitted). Our supreme court recently held that a defendant is entitled to a theory of defense jury instruction if:

> (1) the defense relates to a legal theory of a defense, as opposed to an interpretation of the evidence; (2) the request is timely made; (3) the defense is not adequately covered by other instructions; and (4) the defense is supported by sufficient evidence.

Id. at 212-13, 556 N.W.2d at 706 (citations omitted). The source of such evidence may be facts produced by the State or by the defense. *See* ***id.*** at 214, 556 N.W.2d 707. Further, we must ask whether a reasonable construction of the evidence, viewed favorably to the defendant, supports the defense. *See* ***id.*** On review of a denial of a requested instruction, we examine the instructions as a whole to determine whether they were appropriate and, even if instructions were rejected which were arguably appropriate, we will not reverse unless the failure to include the requested instructions would be likely to prejudice the defendant. *See* ***State v. Lenarchick***, 74 Wis.2d 425, 455, 247 N.W.2d 80, 96 (1976).

Miller contends that his theory of defense was not adequately covered by other instructions and insists that instructions regarding the other definitions of bodily harm were required.[3] The State responds that Miller's

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[3] Miller's requested jury instruction provided:

THEORY OF DEFENSE

(continued)

request for these definitions is premised on his misconception that, if the evidence establishes substantial bodily harm, it necessarily precludes the finding of great bodily harm. The State contends that Miller's reasoning is flawed, however, because these statutory definitions are not mutually exclusive—that is, an injury which fits the definition of "bodily harm" or "substantial bodily harm" might also qualify as "great bodily harm." We agree with the State.

The trial court's instructions unequivocally informed the jury that the State had the burden of proving beyond a reasonable doubt all three elements of first-degree reckless injury. *See* WIS J I—CRIMINAL 1250. The first element required the State to prove that the defendant caused great bodily harm. The trial court defined great bodily harm in accordance with the statutory definition and provided the jury with adequate guidance on that element. *See* ***Cheatham***, 85

> A theory of the defense as to Count 2 which charges First Degree Reckless Injury is that injuries sustained by Officer Kim Shervey do not constitute "great bodily harm" as that phrase is defined by Wisconsin law.
>
> Section 939.22 of the Criminal Code of Wisconsin defines three types of bodily harm.
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> One type is "bodily harm" which means physical pain or injury, illness or any impairment of physical condition.
>
> The second type is "substantial bodily harm" which means bodily injury that causes a laceration that requires stitches; any fracture of a bone; a burn; a temporary loss of consciousness, sight or hearing; a concussion; or a loss or fracture of a tooth.
>
> The third type is "great bodily harm" as was defined for you in the Court's instruction as to First Degree Reckless Injury. That is, bodily injury which creates a substantial risk of death, or which causes serious permanent disfigurement, or which causes a permanent or protracted loss or impairment of the function of any bodily member or organ or other serious bodily injury.
>
> You may find the defendant guilty of Count 2 only if you find that the defendant caused Officer Kim Shervey injury that rises to that type of bodily injury that the law defines as "great bodily harm."

Wis.2d at 123-24, 270 N.W.2d at 200; *see also* ***State v. Pruitt***, 95 Wis.2d 69, 80-81, 289 N.W.2d 343, 348 (Ct. App. 1980) (if instructions adequately cover the law applicable to the facts, the reviewing court will not find error in refusing to give special instructions). By contrast, Miller's proposed instruction could have erroneously misled the jury to believe that if a particular injury fell within the definition of substantial bodily harm, it could not qualify as great bodily harm. Consequently, the proposed instruction was not only unnecessary but also misleading. Accordingly, we conclude that the trial court properly denied Miller's requested instruction.

By the Court.—Judgment affirmed.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.